88-1152

Supreme Court, U.S.
FILED
DEC 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

INCOME PROPERTIES, INC., ET AL.,
PETITIONER

vs.

JOHN C. LUNSFORD, ET AL. -- RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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18 pp

QUESTION PRESENTED

MAY THE SUPREME COURT OF GEORGIA (OR ANY COURT) DECIDE A FACTUAL ISSUE RAISED BY ONE PARTY'S MOTION WITHOUT GIVING THE OPPOSING PARTY AN OPPORTUNITY FOR A HEARING AND AN OPPORTUNITY TO PRESENT OPPOSING EVIDENCE.

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QUESTION PRESENTED

A. MAY THE SUPREME COURT OF GEORGIA (OR ANY COURT) DECIDE A FACTUAL ISSUE RAISED BY ONE PARTY'S MOTION WITHOUT GIVING THE OPPOSING PARTY AN OPPORTUNITY FOR A HEARING AND AN OPPORTUNITY TO PRESENT OPPOSING EVIDENCE? (i)

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioners, Income Properties, Inc., et al., respectfully pray that a Writ of Certiorari issue to review the judgment (renderd without opinion) of the Supreme Court of Georgia entered in this case on September 7, 1988, rehearing denied September 22, 1988.

I.

OPINION BELOW

The judgment entered by the Supreme Court of Georgia on September 7, 1988 and the judgment denying the Motion for Rehearing are set out as Exhibits A & B to this Application.

II.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

III.

CONSTITUTIONAL PROVISION INVOLVED

This Application is brought pursuant to the Fifth Amendment to the Constitution of the United States which provides (in relevant part):

"No person shall . . . be deprived of life, liberty, or property without due process of law . . . ".

IV.

STATEMENT OF FACTS

The case in the trial court involved the efforts of the Plaintiff (Respondent) to cut off and terminate the ownership and possessory rights of the Defendants (Applicants) to a certain commercial

building located in Atlanta, Georgia. The property had been developed by the Defendants and they had occupied a part of the premises ever since they had built it in the early 1950's.

The Plaintiff had foreclosed on this property in 1976. The Defendants continued to occupy this property even after this foreclosure pursuant to a written lease which had been executed many years previously. The Plaintiff brought this action in an effort to terminate the lease and all of the Defendants' rights under it.

A non-jury trial in the Fulton County Superior Court resulted in a judgment for the Plaintiffs. This judgment was entered on October 19, 1987.

Georgia law provides that an appeal is taken from a judgment by the filing of

a Notice of Appeal and further provides that such Notice of Appeal must be filed within thirty (30) days of the date of the judgment (O.C.G.A. § 5-6-37).

"Filing" under Georgia law means filing with the Clerk of the trial court (O.C.G.A. § 5-6-37). "Filing" under Georgia law also means handing a paper to the Clerk (or Deputy Clerk) of the Court. This may be accomplished at any place, even the home of the Clerk. In other words, a party has properly filed a paper with the Clerk when he hands the paper to the Clerk or to a Deputy Clerk. The place where this is accomplished is immaterial [Duke's v. Ralston Purina Co., 127 Ga. App. 696; New England Mortgage Co. v. Collins, 150 Ga. 104(2)].

The Fulton County (Atlanta) Georgia Courthouse and Clerk's office has

experienced the same growth problems that affect the operations of many governmental units, and the volume of business has required the Clerk's office to be divided between floors in the Courthouse. The regular, traditional, and normal filing desk continues to operate in the same first-floor location that it has always occupied. However, the filing desk for appellate pleadings (including Notices of Appeal) has been moved to a back office of the second floor of the Courthouse. The Clerk prefers that Notices of Appeal be filed on the second floor, but that is not a matter of law, printed rule, regulation, or ordinance of any kind. It is simply an informal request that the Clerk makes of litigants.

In this case, the Notice of Appeal was timely and properly prepared, timely and properly served on opposing counsel, and timely and legally filed with the Clerk. However, it was filed with the main filing desk on the first floor instead of on the second floor. Apparently, the Clerk's office re-routed the Notice of Appeal in its inter-office mail to the second floor filing desk, and by the time it was received and entered FILED by that second floor desk it was past the thirty (30) day period.

No mention of this fact was ever made by the Plaintiff (Respondent) in the trial court. Instead, Plaintiff waited until the case had been transferred to the Supreme Court and filed a Motion to Dismiss the Appeal.

The Defendants responded to the Motion to Dismiss by pointing out these same facts as recited above. The Applicants also requested an opportunity (either in the Supreme Court or in the trial court) to show what had transpired and that proper and timely filing had actually taken place.

When the Plaintiff filed his Motion to Dismiss, the appeal had been scheduled for oral argument pursuant to Rule 49 of the Supreme Court of Georgia.

The Supreme Court of Georgia, on its own motion, cancelled the oral argument and entered an order and judgment dismissing the appeal.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Due Process means the right to a meaningful hearing (Mathews v. Eldridge, 96 S. Ct. 893, 424 U.S. 319, 47 L. Ed 2 18). In this case, the Supreme Court of Georgia denied Applicants any opportunity to contest the written notation of the Clerk as to the date of filing. Furthermore, this matter was presented to the Supreme Court of Georgia as an original issue never having been raised in any court or in any hearing or proceeding previously. The Supreme Court of Georgia made a factual determination without affording any opportunity to contest the fact, to offer contrary evidence, or to be heard in any way in opposition. As a result, all of Applicants' property rights have been lost.

Had an administrative body or another branch of government acted in such a way, it would have been clearly violative of the most fundamental notions of due process. A state Supreme Court can no more violate the requirements of due process than can any public officer, body, or unit.

Any governmental official can abuse the power entrusted to him, and there are times when it becomes necessary to control an governmental official from the President on down. A state Supreme Court Justice can fail to give due process just as can a police officer, and both need to be controlled.

The procedures adopted by the Supreme Court of Georgia are absolutely deficient and are utilized by them repeatedly, not just in this case. The

Supreme Court of Georgia's actions should not be above scrutiny because it is a court.

A court must observe the requirements of due process before any other person or body can be expected to.

CONCLUSION

A court cannot adopt impermissible procedures just as any other unit of government cannot, and the same scrutiny and safeguards must be employed to prevent judicial deprivations of due process as apply to all others. Courts should set the example of observing the fundamental notions of fair play and while their standards should be higher than others, they surely cannot be lower.

Respectfully submitted,

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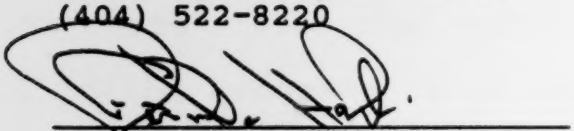

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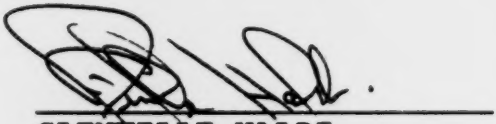
CERTIFICATE OF SERVICE

This is to certify that I have this date served opposing counsel with a true and correct copy of the within and foregoing Petition for Writ of Certiorari by depositing same into the United States Mail with adequate postage thereon, and addressed as follows:

Mr. Tom Pye, Esquire
6485 Peachtree Industrial Blvd.
Doraville, Georgia 30360

This _____ day of December, 1988.



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SUPREME COURT OF GEORGIA

ATLANTA September 7, 1988

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

INCOME PROPERTIES, INC., ET AL. V. JOHN C. LUNSFORD, ET AL., EXRS.

From the Superior Court of Fulton County

Upon consideration of the motion to dismiss filed in this case, it is ordered that it be hereby granted.

Exhibit A

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA, September 22, 1988

The motion for a rehearing was denied today:

Case No. 46018, Income Properties, Inc., et al. v. Lunsford, Exr., et al.

Exhibit B